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CONFLICT OF LAWS AS APPLIED TO ASSIGNMENTS FOR CREDITORS.

WHEN a trader or a trading corporation becomes insolvent the common law of England and America permits the several creditors to obtain such advantage and preference as legal diligence may chance to give them, and authorizes the debtor to make such preferences among them as he pleases.

Bankrupt laws are intended to change all this, and to give to all creditors of equal rank an equal share in the debtor's property. Courts of Equity, though they cannot interfere with legal diligence or legal assignments, have borrowed the notion of equality, and will apply it whenever a case is fully under their control, as where an insolvent corporation is being wound up, or where creditors proceed in equity against equitable assets.

Not only in Courts of Equity but in the mercantile world it is now admitted to be both wise and just that all creditors should share alike the assets of an insolvent. In some of our States bankrupt laws have been passed, and in others laws regulating general assignments, all aiming, with more or less success, at this equality.

Notwithstanding this general *consensus* of opinion, it is impossible to attain equality among creditors if the debtor has property and owes debts in several States or countries, by reason of a cer-

tain principle of law which was adopted in this country when the conditions of business were very different from those now obtaining.

The several States of the United States are, in law, foreign to each other, and the effect in one State of bankruptcy of a debtor in another State or in a foreign country depends upon the doctrines of private international law as understood in the States in which the questions arise. The principle above referred to, which is the established law throughout the United States, is, that a decree in a foreign country or a sister State, by which the property of a bankrupt resident in such country or State has been taken from him and vested in trustees for his creditors, will not receive recognition in our Courts as against the attachments of creditors who are citizens of the *forum* of the attachment, even when the decree precedes the attachment.

A few decisions were supposed to go even farther, and to hold that a trustee thus appointed had no standing in our Courts; and that his title could not even prevail against that of the bankrupt himself. The case of Abraham *v.* Plestoro, 3 Wend. 538, was cited for the doctrine. But that decision has been explained to mean much less, and in the highest Court of the State where it was made (New York) a trustee in bankruptcy in England has lately recovered from the bankrupt himself, who happened to be in New York, funds which the bankrupt had collected from debtors of his firm residing there. *In re* Waite, 99 N.Y. 433.

Some *dicta* in Booth *v.* Clark, 17 How. 322, have been taken to mean that a receiver or assignee cannot sue in the Courts of a State other than that of his appointment. But no such point was decided; and it is important to observe that the receiver in that case was one appointed under a bill in equity for the benefit of a single creditor, and might be considered to be a mere officer of the Court appointing him. Receivers for the benefit of creditors generally under proceedings for foreclosure or winding up, and assignees under a State insolvent law, have repeatedly maintained actions which have passed the ordeal of the Supreme Court, and on that point no question can now be raised.

In England the law was laid down about a century since, and has always been adhered to, that the decree of a foreign Court of the debtor's domicile, vesting his property in trustees for creditors, transfers to them the personal property in England, in spite of

any legal diligence which English creditors or others may afterwards seek to exercise.

Chancellor Kent, in Holmes *v.* Remsen, 4 Johns. Ch. 460, reasoned in favor of this doctrine, and tried to introduce it into our jurisprudence, but without success. Our Courts still hold that our creditors attaching here, though their actions are begun after the date of the foreign decree, have the better right.

The American doctrine is not founded on an avowed policy or principle that our own citizens should, in any event, have the right to the assets within our jurisdiction. If no creditor happens to be in a situation to attach the personal property, the foreign trustee may take it, and no injunction will be granted to restrain him at the suit of creditors here whose debts have not matured. If he does take it and remove it from the State, no action lies against him to recover it back for the benefit of our citizens. If a foreign creditor attaches first, though it be in the interest of the foreign trustee, our own citizens, afterwards attaching, are not given a priority. We merely say that we do not respect a foreign decree as against our own citizens, who have an opportunity to use the process of our Courts, whether our course seems consistent with the usual rules of international law or not. Thus Chief Justice Gibson says, in substance, in Miliken *v.* Aughenbaugh, 1 Penn. R. 117, 125, that our Courts do not consider that international comity requires us to interfere to prevent creditors who owe no allegiance to the foreign government from pursuing their remedies against any property which accident has subjected to their power. And Story, Confl. Laws, § 420, says: "The point hitherto has been a struggle for priority and preference between parties claiming against the bankrupt by opposing titles; the assignees claiming for the general creditors, and the attaching creditors for their several rights."

It is, therefore, not quite accurate to treat this point as one of conflict between the law of the foreign debtor's domicile and the law of the *situs* of his property here. We have no law of the *situs* giving preference to our creditors, but simply refuse to interfere and aid the foreign trustee against the legal diligence of our creditors who may have the good fortune to be able to attach or take in execution the effects here before the trustee has removed them.

A policy to satisfy our own creditors first out of the assets here

would be a straightforward and intelligible policy, though narrow and selfish. Such was the law at one time in Maryland, and possibly in some other States. Our motive is to aid our own creditors; but we do it, as it were, underhand, so that we have the discredit of a want of comity, and fail to reap its full advantages.

The working of our rule is sometimes very annoying. If an insolvent trading corporation, for instance, is being wound up by receivers in New York, for the equal benefit of all its creditors, precisely as such a corporation would be wound up in Massachusetts, and a debtor of the corporation is summoned as garnishee in Massachusetts, by a creditor of the corporation residing in Massachusetts, and answers that the receivers in New York have demanded payment of the debt or have begun an action for it against him, the Courts of Massachusetts will give precedence to their own attaching creditor. Taylor *v.* Columbian Ins. Co., 14 Allen, 353. If the same debtor is sued by the receivers in New York, and answers that he is summoned as garnishee of the corporation in Massachusetts, the Courts of New York will decide that the receivers have the better title. Osgood *v.* Maguire, 61 N.Y. 524.

Thus an honest debtor is twice vexed and put to trouble and expense; and if the case in Massachusetts is finished first, and the judgment is satisfied, a preference is obtained by the attaching creditor, although the laws of both States, when dealing with their own insolvent corporations, insist upon equality among creditors, foreign and domestic.

The injustice of the American practice has been often admitted, and several judges have suggested that the subject might be regulated with foreign countries by treaty. Such treaties have been made between some of the nations of Europe.

In Dawes *v.* Head, 3 Pick. 128, the Supreme Court of Massachusetts, in the case of a deceased foreign insolvent who had left some property here, declared that the practice above referred to ought not to be extended, and that the true rule for distributing the estate here was to give to the creditors here their full and equal dividend, taking into account all the assets and all the debts, both here and elsewhere. This suggestion has been adopted by statute in several States and by decision in others.[1] In Harrison

[1] See 4 Kent, Com. 434.

v. Sterry, 5 Cranch, 289, both rules were adopted; that is to say, the attaching creditors were first satisfied, and the surplus was disposed of with due regard to all debts and all assets.

The reasons of policy and convenience which induced our Courts to refuse full operation to a foreign decree, apply with equal force to assignments by the debtor himself upon similar trusts. Most of our Courts give greater effect to the latter than to the former; but if we admit, as we do, that a decree assigning movables is valid excepting against attachments, there is no sound reason for not making a similar exception to the operation of assignments in this country. The technical distinction, as usually given, is, that a decree does not operate by its own force (*proprio vigore*) in a foreign country, while an act of the party does so operate; but this is merely restating the proposition that we give full effect to one mode of assignment and only an incomplete effect to the other, both being valid or invalid as we may choose to give them much or little effect by comity.

In some few States the law of comity is consistently administered, and an assignment by the party is only respected when it conforms to our notions of justice. But in most States, as we have said, an assignment of movables, made by the owner, and good at the place where it is made, is held good here, unless it contravenes some express statute or discriminates against our creditors as such.

Real estate, both in England and the United States, cannot pass by a foreign decree, but must be conveyed by deed according to the forms and methods established by the law of the *situs*. When these forms are observed, there is no rational distinction between a transfer of land and one of movables. It is, however, sometimes held that the trusts upon which land is conveyed, as well as the forms of conveyancing, must accord with the general policy of the law of the *situs*. It is undoubtedly true that if there is any positive law of the *situs*, it must govern; but the better modern opinion is, that this applies to movables as well as to immovables. If no positive law intervenes, there is no sound distinction between assignments of one kind of property or another in regard to the trusts upon which it is to be held.

It results from the superior authority given to a deed of the debtor over a decree transferring his property, that an insolvent owning property in several States is forced to make an assignment,

though he and all his creditors whose wishes can be ascertained would prefer that he should become a bankrupt under the law of his State; because his assignment, promptly recorded, will prevent an attachment of real and personal estate held in one or more States not of his domicile, while a decree will not have this effect. Such an assignment is not as useful or as easily worked or as economical as one under a carefully drawn insolvent law like that of Massachusetts, and is less beneficial for the debtor and for his creditors than the decree, if only the latter would be given its due operation; but there is no option if the debtor would preserve equality among his creditors against a race of diligence among them.

It is obvious that, in the present state of commerce and of communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place; better for the creditors, who would thus share alike, and better for the debtor, because all his creditors would be equally bound by his discharge.

If there is inconvenience in proving debts in a foreign country, ancillary administration might be granted here, as is done upon the estate of a deceased person.

It is not so easy to see how this result is to be reached in actual practice. A general bankrupt law would necessarily establish equality in this country as between debtor and creditors in the States, and might contain an enactment for foreign insolvents owning property here, putting them on the footing of Dawes *v.* Head and Harrison *v.* Sterry, *minus* the attachments in the latter case; or, with foreign nations, we might have treaties, as has been suggested by many jurists impressed with the injustice and confusion of our present practice. It is not, however, our purpose in this article to recommend a general bankrupt law, but only to point out the state of this branch of private international law.

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